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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL
 UNION, Local 790,

Plaintiff,

v.

JOSEPH NORELLI, Regional Director of
 National Labor Relations Board, Region 20,
et al.,

Defendants.

NATIONAL LABOR
 RELATIONS BOARD'S
 OPPOSITION TO MOTION
 FOR TEMPORARY
 RESTRAINING ORDER

No. 07-cv-02766-PJH

Date:

Time:

Judge:

Courtroom:

TABLE OF CONTENTS

	<u>Page(s)</u>
INTRODUCTION	1
RELEVANT STATUTORY PROVISIONS	1
FACTUAL BACKGROUND.....	2
ARGUMENT.....	4
I. STANDARD FOR A TEMPORARY RESTRAINING ORDER.....	4
II. THE UNION HAS NO LIKELIHOOD OF SUCCESS BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE BOARD’S EXERCISE OF DISCRETION TO CONDUCT A DEAUTHORIZATION ELECTION	7
A. Board Representation Proceedings are Not Subject to Direct Judicial Review	7
B. This Case Does Not Fall Within Any Exception to the Prohibition of District Court Review of Board Representation Proceedings	8
1. The <u>Leedom</u> Exception to Nonreviewability is Exceedingly Narrow.....	8
2. There is no Jurisdiction Under <u>Leedom</u> Because the Board Here Did Not Violate Any Clear and Mandatory Statutory Provision	9
III. THE UNION CANNOT SHOW IRREPARABLE INJURY OR THAT ITS ALLEGED INJURY OUTWEIGHS THE HARM TO THE BOARD AND PUBLIC INTEREST IN PERMITTING EMPLOYEES TO RESCIND A UNION-SECURITY AGREEMENT....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<u>Albert Van Luit & Co.</u> , 234 N.L.R.B. 1087, 1087-88 (1978).....	4
<u>American Federation of Labor v. NLRB</u> , 308 U.S. 401 (1940)	7
<u>Andor Co.</u> , 119 N.L.R.B. 925 (1957)	12
<u>Bakersfield City School District v. Boyer</u> , 610 F.2d 621 (9th Cir. 1979)	15
<u>Bays v. Miller</u> , 524 F.2d 631 (9th Cir. 1975)	8,9
<u>Bishop v. NLRB</u> , 502 F.2d 1024 (5th Cir. 1974)	7,9
<u>Boire v. Greyhound Corp.</u> , 376 U.S. 473 (1964).....	1,7,9
<u>Calamore v. Juniper Networks, Inc.</u> , 2007 WL 1100333, Case No. 07-01772 MJJ (N.D. Cal. April 12, 2007)	4
<u>Chicago Truck Drivers v. NLRB</u> , 599 F.2d 816 (7th Cir. 1979).....	8,9
<u>Cihacek v. NLRB</u> , 464 F. Supp. 940 (D. Neb. 1979)	9
<u>Covenant Aviation Security, LLC</u> , 349 NLRB No. 67 (March 30, 2007).....	passim
<u>Eisinger v. Federal Labor Relations Authority</u> , 218 F.3d 1097 (9th Cir. 2000).....	9
<u>FTC v. Standard Oil Co.</u> , 449 U.S. 232 (1980)	14
<u>Great Atlantic & Pacific Tea Co.</u> , 100 NLRB 1494 (1952).....	11,12
<u>Herald Co. v. Vincent</u> , 392 F.2d 354, 356 (2d Cir. 1968)	7
<u>International Ass'n of Tool Craftsmen v. Leedom</u> , 276 F.2d 514 (D.C. Cir. 1960).....	14
<u>Leedom v. Kyne</u> , 358 U.S. 184 (1958)	1,8
<u>Local Union No. 714, International Brotherhood of Teamsters v. Madden</u> , 343 F.2d 497 (7th Cir. 1965).....	passim
<u>NLRB v. A.J. Tower Co.</u> , 329 U.S. 324 (1946).....	13
<u>NLRB v. Berryfast, Inc.</u> , 741 F.2d 1161 (9th Cir. 1984).....	13

Cases--Cont'd: **Page(s)**

<u>NLRB v. Best Products Co., Inc.</u> , 765 F.2d 903 (9th Cir. 1985).....	13
<u>NLRB v. California Horse Racing Board</u> , 940 F.2d 536 (9th Cir. 1991).....	8
<u>NLRB v. General Motors Corp.</u> , 373 U.S. 734 (1963).....	1-2
<u>NLRB v. IBEW</u> , 308 U.S. 413 (1940).....	7
<u>National Maritime Union v. NLRB</u> , 375 F. Supp. 421 (E.D. Pa.), <u>aff'd</u> , 506 F.2d 1052 (3d Cir. 1974).....	9,14
<u>Physicians Nat'l House Staff Ass'n v. Fanning</u> , 642 F.2d 492, 496 (D.C. Cir. 1980)	9
<u>Renegotiation Board v. Bannerkraft Clothing Co., Inc.</u> , 415 U.S. 1 (1974).....	14-15
<u>State of California v. Federal Trade Commission</u> , 549 F.2d 1321 (9th Cir. 1977)	15
<u>Teamsters, Local 690 v. NLRB</u> , 375 F.2d 966 (9th Cir. 1967)	9,14
<u>UFCW, Local 400 v. NLRB</u> , 694 F.2d 276 (D.C. Cir. 1982).....	7

Statutes:

National Labor Relations Act, as amended (29 U.S.C. § 151, <i>et seq.</i>):	
§ 8(a)(3) (29 U.S.C. § 158(a)(3)).....	1,2,14
§ 9 (29 U.S.C. § 159)	7
§ 9(b)(1) (29 U.S.C. § 159(b)(1))	8
§ 9(e)(1) (29 U.S.C. § 159(e)(1)).....	passim
§ 10(e) (29 U.S.C. § 160(e))	7
§ 10(f) (29 U.S.C. § 160(f)).....	7

Legislative Materials:

United States Code, Congressional and Administrative Service, 80th Congress, First Session, 1947, Congressional Comments at pp. 1156-1157.....	10-11
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Administrative Materials:

National Labor Relations Board Rules and Regulations 29 C.F.R. §102.85	3
NLRB Casehandling Manual Representation Proceedings (Part Two)(GPO 1989): §11506.5	3

INTRODUCTION

Defendants Joseph Norelli, Regional Director for Region 20 of the National Labor Relations Board and the individual Members of the National Labor Relations Board (collectively, “the Board”) respectfully submit this Opposition to Plaintiff’s Motion for Temporary Restraining Order (Docket No. 29). As demonstrated below, this Court lacks subject matter jurisdiction to review or enjoin the Board’s exercise of its discretion pursuant to Section 9(e)(1) of the National Labor Relations Act (“NLRA” or “the Act”), 29 U.S.C. § 159(e)(1) (1998), to conduct an election for employees to consider deauthorizing a union-security agreement. This case is no exception to the general rule barring judicial review of NLRA representation proceedings because the Union cannot show, as it must, that the Board violated a clear and mandatory provision of the NLRA. Accordingly, the injunction should be denied. See Boire v. Greyhound Corp., 376 U.S. 473, 476-77, 481 (1964); Leedom v. Kyne, 358 U.S. 184, 190 (1958). Injunctive relief should be denied for the additional reason that the Union has failed to demonstrate that the Board’s election procedure has resulted in an irreparable injury to the Union, or that the Union’s interest in enjoining the anticipated deauthorization election outweighs the harm to the Board and public interest in permitting employees to exercise their choice whether to participate in a union-security arrangement.

RELEVANT STATUTORY PROVISIONS

A “union-security” agreement is permitted under the first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1998). This statutory provision generally allows employers and unions to enter into agreements requiring employees in a bargaining unit to obtain and retain “membership” in the union beginning on or after the thirtieth day following entry on duty. Such union “membership” requires only the payment of initiation fees and periodic dues. NLRB v.

1 securing of the required employee signatures demonstrating the thirty percent “showing of
 2 interest” pre-dated the effective date of the union-security agreement (Exh. 1 to Complaint at 2).¹
 3 Significantly, as to the separate premature filing of the actual petition, the Regional Director
 4 noted that such deficiency, standing alone, could easily be remedied by filing a second timely
 5 petition. (Exh. 1 to Complaint at 2-3.) Petitioner Stephen Burke filed a Request for Review of
 6 the Regional Director’s decision with the Board. (Exh. 2 to Complaint at 1.)

7
 8 On March 30, 2007, the Board (Chairman Battista and Member Kirsanow, Member
 9 Walsh dissenting) issued its Decision on Review and Order, reinstating the deauthorization
 10 petition and remanding the case to the Regional Director for further appropriate action.
 11 (Covenant Aviation Security, LLC, 349 NLRB No. 67, p. 1 (March 30, 2007))(Exh. 2 to
 12 Complaint)). The Board found that the timing of the employee signatures supporting the
 13 showing of interest did not render the deauthorization petition invalid. The Board reasoned that
 14 “[r]equiring the Petitioner to have waited until after a contract containing a union-security
 15 provision came into effect before obtaining signatures . . . impermissibly delayed the effectuation
 16 of employees’ statutory right to rescind the effect of a union-security clause.” (Exh. 2 to
 17 Complaint at 2.) Although the Board agreed with the Regional Director that the deauthorization
 18 petition should have been filed only after the union-security provision became effective, the
 19 Board also noted that the Regional Director found that such infirmity could be remedied by

20
 21
 22
 23 ¹ The “showing of interest” in this case was the submission of employee signatures to the
 24 Regional Director in support of the deauthorization petition. Under Board procedure, after such
 25 signatures are submitted, the Region investigates the signatures’ authenticity and relevance. See
 Board’s Rules and Regulations § 102.85, 29 C.F.R. § 102.85 (1961); NLRB Casehandling
 Manual Part Two-Representation Proceedings, §11506.5 (available at
<http://www.nlr.gov/publications/>).

1 refilling the petition and that no party requested review of this issue. (Exh. 2 to Complaint at 1
2 n.1, 2-3.)

3 Significantly, on April 6, 2007, the petitioner filed a new deauthorization petition with
4 Region 20 of the Board, Board Case No. 20-UD-447, later amended to reflect the proper local
5 union. The amended petition was served on all parties, including the Union (see Board Exhs. 2
6 and 3 to Docket No. 14). The Regional Director issued a Direction of Election upon this new
7 petition, ordering that a deauthorization election be held by mail (see Board Exh. 5 to Docket
8 No. 14). Subsequently, the parties were advised that the Transportation Security Administration
9 had raised concerns, delaying the mailing of ballots for the election. However, these concerns
10 appeared to be resolved, and the Board issued a new Direction of Election on June 1, 2007,
11 stating that the Region would mail the ballots to employees on June 22, 2007 and count the
12 received ballots on July 9, 2007. (See Board Exh. 6 to Docket No. 22.)²

14 On June 6, 2007, the Board filed a Motion to Dismiss the instant complaint, on grounds
15 of lack of jurisdiction (Docket No. 22). On June 7, 2007, the Union filed the instant Motion for
16 Temporary Restraining Order (Docket No. 29).

17 ARGUMENT

18 I. STANDARD FOR A TEMPORARY RESTRAINING ORDER

19 To prevail on a motion for a temporary restraining order, the Union must show: (1) a
20 strong likelihood of success on the merits, (2) the possibility of irreparable injury to the Union if
21 preliminary relief is not granted, (3) a balance of hardships favoring the Union, and (4)
22 advancement of the public interest (in certain cases). See Calamore v. Juniper Networks, Inc.,
23

24 ² Under the NLRA, for most employees there is no possible change to the union-security
25 agreement from the deauthorization proceeding until after the Board resolves any objections filed
by the parties to the conduct of the election and certifies the election results. See Albert Van
Luit & Co., 234 NLRB 1087, 1087-88 (1978).

2007 WL 1100333 at * 1, Case No. 07-01772 MJJ (N.D. Cal. April 12, 2007). Alternatively, injunctive relief could be granted if the Union “demonstrate[d] either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in [its] favor.” Id. (citation omitted). These two alternatives represent extremes of a single continuum, rather than two separate tests. Id. (citation omitted). As a result, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by that party. Id. In this case, for the reasons explained below, the Union can demonstrate neither any probability of success nor any cognizable hardship.

Initially, we note that the Union, to support its instant demand for emergency injunctive relief, has proffered baseless, overheated rhetoric claiming that “Defendants forced this dispute into an emergency . . . , by stubbornly refusing to agree to a very short, reasonable delay in the disputed election,” and that “Defendants are attempting to improperly exploit Judge Hamilton’s absence to conduct a legally spurious election without judicial oversight, despite their knowledge that Judge Hamilton found objections to it sufficiently meritorious to demand that Defendants appear in court to defend their action,” see Memorandum in Support of Motion for Temporary Restraining Order at 5 (Docket No. 28).

First, the Union has been aware since March 2007, when it received the Board’s Decision remanding the matter to the Region for further proceeding (Exhibit 2 to Docket No. 1), that the Agency plans to conduct a deauthorization election in this case. At any time since then, the Union could have filed its Complaint and Motion for Preliminary Injunction, and had this case decided by this Court on a less expedited schedule. Moreover, the Regional Director first issued a Direction of Election in this case on May 9, 2007 (Board Exhibit 5 to Docket No. 14), and an amended Direction of Election on June 1, 2007 (Board Exh. 6 to Docket No. 22). Plaintiff

1 chose to wait until May 25, 2007 to file its Complaint (Docket No. 1), and two more weeks after
2 that, until June 7, 2007, to file its Motion for a Temporary Restraining Order (Docket No. 29).
3 Thus, any “emergency” here is a self-inflicted wound caused by the Union’s delay, and should
4 not require this Court to issue a Temporary Restraining Order, particularly when, as shown
5 below, the Court lacks the requisite subject matter jurisdiction to do so.
6

7 Second, the Board respectfully submits that Judge Hamilton’s issuance of the Order to
8 Show Cause does not mean that she found the Union’s Complaint to be meritorious. As the
9 Union itself noted (Docket No. 30 at 3), the Board never objected to the holding of a hearing
10 regarding the Union’s Motion for Preliminary Injunction. The Board only objects to the grant of
11 any injunctive relief. Thus, the fact that Judge Hamilton ordered a hearing to which the Board
12 did not object means precisely nothing.

13 Third, the Union well knows that the self-imposed injunction it asked of the Board to
14 delay the mailing of ballots was not just for the five-day time period between when the Board
15 plans to mail the ballots in this case and Judge Hamilton’s preliminary injunction hearing.
16 Instead, the Union sought in addition, the further time necessary for Judge Hamilton to actually
17 render her decision, based upon her review of the many pages of briefs that have already been
18 submitted in this case.³ Although the Board expects that Judge Hamilton would attempt to issue
19 a ruling as expeditiously as possible, the Union was seeking a delay of the Agency’s proceeding
20 for a lawsuit which the Board views to be entirely meritless. Thus, it was hardly unreasonable
21 for the Board to refuse to cave to the Union’s baseless demand for injunctive relief.
22

23
24 ³ Moreover, the Union is utterly incorrect in alleging that the key decision before Judge Hamilton
25 is “whether the Board possesses the jurisdiction to order the disputed election.” (Docket No. 28
at 2). In fact, the central issue in this case is whether the extraordinarily narrow circumstances
delineated under Leedom (explained further below) are present in this case sufficient for this
Court to have jurisdiction to enjoin the Board’s proceeding.

II. THE UNION HAS NO LIKELIHOOD OF SUCCESS BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE BOARD'S EXERCISE OF DISCRETION TO CONDUCT A DEAUTHORIZATION ELECTION

A. Board Representation Proceedings are Not Subject to Direct Judicial Review

Board representation cases are not subject to district court review or direct appellate review. See Boire v. Greyhound Corp., 376 U.S. 473, 476-77, 481 (1964); NLRB v. IBEW, 308 U.S. 413, 414-15 (1940); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974); Local Union No. 714, Int'l Bhd. of Teamsters v. Madden, 343 F.2d 497, 499 (7th Cir. 1965) (precluding union's claims for district court review of a Section 9(e)(1) determination by the Board). This is so because proceedings under Section 9 are nonadversarial in nature and do not result in the issuance of "final orders" subject to judicial review under Sections 10(e) and (f) the NLRA, 29 U.S.C. § 160 (e) and (f) (1998). American Fed'n of Labor v. NLRB, 308 U.S. 401, 409 (1940); UFCW, Local 400 v. NLRB, 694 F.2d 276, 278 (D.C. Cir. 1982) (per curiam); Bishop, 502 F.2d at 1027; Herald Co. v. Vincent, 392 F.2d 354, 356 (2d Cir. 1968). "Congress has determined that the NLRB, and not the courts, is to be the umpire in representation disputes." Bishop, 502 F.2d at 1027.⁴ Indeed, the Supreme Court in American Fed'n of Labor recognized that the NLRA's scheme may well fail to provide judicial review for parties affected by a Board representation proceeding. 308 U.S. at 411-12. Nevertheless, the Court expressly noted that any problems posed by this scheme should be raised before Congress and not the courts. Id. at 411.

⁴ The NLRA provides limited indirect appellate court review of representation determinations. Such review is provided if and when those determinations serve as the underlying predicate for a final order subsequently issued in a related unfair labor practice proceeding. 29 U.S.C. § 160(e), (f) (1998); see Boire, 376 U.S. at 476-77; American Fed'n of Labor, 308 U.S. at 409.

1 The Union's attempt to obtain review here impermissibly seeks to bypass this judicially-
 2 recognized Congressional intent. See Bays v. Miller, 524 F.2d 631, 633 (9th Cir. 1975); Chicago
 3 Truck Drivers v. NLRB, 599 F.2d 816, 818 (7th Cir. 1979). For the reasons set forth below,
 4 moreover, this matter does not fit within the narrow exceptions to the rule of non-reviewability.

5 **B. This Case Does Not Fall Within Any Exception to the Prohibition of District**
 6 **Court Review of Board Representation Proceedings**

7 1. The Leedom Exception to Nonreviewability is Exceedingly Narrow

8 The Supreme Court recognized a very narrow exception to the general rule of
 9 nonreviewability of Board representation determinations in Leedom v. Kyne, 358 U.S. 184, 187
 10 (1958). The Supreme Court there ruled that an exception to the rule of no district court
 11 jurisdiction arises where the

12 suit is not one to "review," in the sense of that term as used in the Act, a
 13 decision of the Board made within its jurisdiction. Rather [the suit] is one
 14 to strike down an order of the Board made in excess of its delegated
 powers and contrary to a specific prohibition in the Act.

15 Id. at 188. The Court concluded that, since the professional employee provision of Section
 16 9(b)(1) imposed a "clear and mandatory" statutory obligation on the Board, 358 U.S. at 188, the
 17 district court had jurisdiction to set aside the Board's exercise of a power that had been
 18 specifically withheld from it by Congress. Id. at 189.

19 The Supreme Court subsequently clarified that the Leedom exception to non-
 20 reviewability is extremely narrow:

21 [t]he [Leedom] exception is a narrow one, not to be extended to permit
 22 plenary district court review of Board orders in certification proceedings
 23 whenever it can be said that an erroneous assessment of the particular facts
 24 before the Board has led it to a conclusion which does not comport with
 the law.

1 Boire v. Greyhound, 376 U.S. 473, 481(1964); see also Teamsters, Local 690 v. NLRB, 375 F.2d
 2 966, 976 (9th Cir. 1967) (Leedom applies only in “extraordinary circumstance”); NLRB v.
 3 California Horse Racing Board, 940 F.2d 536,540 (9th Cir. 1991) (review of non-final Board
 4 orders permitted only in “narrowest” of exceptions); Madden, 343 F.2d at 500 (Section 9(e)(1)
 5 determination by the Board did not violate “clear and mandatory provision” of the NLRA);
 6 Bishop, 502 F.2d at 1030.

7
 8 Consistent with Boire, the courts have refused to extend their jurisdictional reach to
 9 review the Board’s representation determinations alleged to have resulted in an error of law,
 10 where the Board did not act in violation of a specific statutory command. Physicians Nat’l
 11 House Staff Ass’n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980) (quoting Chicago Truck
 12 Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979)). Similarly, jurisdiction does not exist for
 13 consideration of alleged arbitrary agency action or an abuse of discretion. See Eisinger v.
 14 Federal Labor Relations Authority, 218 F.3d 1097, 1103 n.5 (9th Cir. 2000); Bays, 524 F.2d at
 15 633. Accordingly, “jurisdiction is not conferred on the district courts to consider ‘the wisdom of
 16 a particular Board policy’” when there is a “disagreement with the Board on a matter of policy
 17 or statutory interpretation.” Cihacek v. NLRB, 464 F. Supp. 940, 943 (D. Neb. 1979) (quoting
 18 National Maritime Union v. NLRB, 375 F. Supp. 421, 434 (E.D. Pa.), aff’d, 506 F.2d 1052 (3d
 19 Cir. 1974)). Rather, district court jurisdiction can only exist where the Board has violated a clear
 20 and mandatory provision of the NLRA.

21
 22 2. There Is No Jurisdiction Under *Leedom* Because The Board Here Did Not
 23 Violate Any Clear and Mandatory Statutory Provision

24 In this case, the Union cannot show that the Board violated a clear and mandatory
 25 requirement of the Act. Section 9(e)(1) provides that upon the filing of a petition by “30 per
 centum or more of the employees in a bargaining unit covered by an agreement between their

1 employer and labor organization made pursuant to section 8(a)(3)” alleging a desire that
 2 authority to make a union-security agreement be rescinded, the Board “shall take a secret ballot
 3 of the employees in such unit and certify the results thereof to such labor organization and to the
 4 employer.” 29 U.S.C. § 159(e)(1) (1998). Although the Union has failed to really acknowledge
 5 this fact in its papers, the Board’s Regional Director is proceeding on a second authorization
 6 petition filed after the effective date of the union-security agreement. Moreover, contrary to the
 7 Union’s argument, the statute places no explicit time limitation upon when the signatures of the
 8 thirty percent of employees must be gathered for such a petition. In other words, Section 9(e)(1)
 9 does not state in clear and mandatory terms that the showing of interest signatures must be
 10 gathered only after a union-security provision goes into effect.

12 The Board here reasonably found that the language of Section 9(e)(1) is “unclear” on this
 13 point and “does not squarely answer the question presented by this case.” The Board explained:

14 Although it is clear from the statutory language that, when filed, a deauthorization
 15 petition must be supported by at least 30 percent of employees “covered by” a
 16 contract containing a union-security provision, Section 9(e)(1) is devoid of language
 17 as to when the showing of interest must be gathered. The employees in the instant
 18 case are “covered by an agreement” containing a union-security clause, and 30
percent of the employees so covered have supported a petition to get rid of that
clause. The fact that the 30 percent expressed their desire prior to the coverage does
 not clearly invalidate their desire.

...

19 It is possible either that Congress did not contemplate the question of whether the
 20 signatures supporting a showing of interest in a deauthorization petition may
 21 predate an effective contract containing a union-security clause, or that Congress
 22 did consider the question but left it to the Board to regulate. Either way, the fact
of the matter is that the statutory language is inconclusive, and thus it falls to the
Board as the agency charged with administering the Act to fill in the statutory
gap. In doing so, we are guided by the Act itself, its legislative history, and
 23 applicable policy considerations.

24 (Exh. 2 to Complaint at 2 (citation omitted) (emphasis added)).
 25

1 As the Board noted, in 1947, the Act was amended to add a requirement, designated as
2 Section 9(e)(1), that employees first had to vote to authorize the union to make a union-security
3 agreement with the employer before the union could do so. The 1947 amendments also added a
4 deauthorization procedure, then set out at Section 9(e)(2). (Exh. 2 to Complaint at 2); see United
5 States Code, Congressional and Administrative Service, 80th Congress, First Session, 1947,
6 Congressional Comments at pp. 1156-1157. Four years later, the Act was amended again to
7 remove the affirmative authorization requirement at Section 9(e)(1), reword the deauthorization
8 provision at 9(e)(2), and designate that section as the new Section 9(e)(1). The Board explained:

10 Significantly, in enacting the 1951 amendments, Congress did not express a
11 preference for union-security arrangements. Neither did it choose to return to the
12 pre-1947 status, under which there was no Board-mandated deauthorization
13 process and the issue of rescinding a union-security provision was left to private
14 parties to handle. Rather, Congress sought to eliminate what it viewed as the
administrative inefficiencies occasioned by former 9(e)(1)'s authorization
requirement, while at the same time preserving the right of employees to
deauthorize an unwanted union-security arrangement.

15 (Exh. 2 to Complaint at 3). Although finding this “inconclusive” regarding any requirement for
16 the timing of securing employee support, the Board reasonably viewed the history as
17 underscoring “Congress’ intent to safeguard the right of employees to deauthorize union
18 security.” Id.

19 Moreover, contrary to the Union’s argument in its memorandum in support of its motion
20 for preliminary injunction (Docket No. 3 at 15), the Board’s refusal to invalidate the showing of
21 interest in this case is consistent with its precedent construing the requirements of Section
22 9(e)(1). In Great Atlantic & Pacific Tea Co., 100 NLRB 1494 (1952), the Board rejected a
23 union’s contention that a deauthorization vote should be prospective only, i.e., that an existing
24 union-security agreement must remain effective for the remainder of a contract’s term. The
25

1 Board there found that Congress did not aim to postpone the employees' will regarding union
2 security. Id. at 1495. "[O]nly by holding that an affirmative deauthorization vote immediately
3 relieves employees of the obligations imposed by an existing union-security agreement" can the
4 Board "give effect to the basic congressional objective . . . of not imposing a union-security
5 agreement upon an unwilling majority." Id. at 1497. The Board majority here also noted Andor
6 Co., 119 NLRB 925 (1957), where, in refusing to dismiss a deauthorization petition, the Board
7 relied upon Congress's intent that the 1951 amendments retain employees' "safety valve" to
8 escape undesired union-security obligations. Id. at 928. Taken together, Great Atlantic &
9 Pacific Tea, Andor, and this case, show a consistent construction of Section 9(e)(1) to protect
10 employees' ability to choose whether to rescind authorization for a union-security agreement.
11 The Board here explained, "in the absence of more specific guidance in either the language of
12 the statute or the legislative history, we consider, as a matter of policy, what resolution of the
13 issue at hand best effectuates Congress' purpose of protecting employee free choice," and found
14 such purpose "best effectuated by processing the instant petition." (Exh. 2 to Complaint at 3).

15
16 There is no merit to the Union's argument in its memorandum in support of its
17 preliminary injunction motion (Docket No. 3 at 13–15) that the pending deauthorization election
18 is contrary to Congress's 1951 elimination of the authorization election, and to the Board's
19 observation in Great Atlantic & Pacific Tea that Congress thereby intended for unions to have
20 presumptive authority to enter into union-security arrangements. Here, the Union obviously has
21 already entered into a union-security agreement that is currently effective. No election was
22 required for that to occur. The election soon to take place will be one where the employees will
23 be voting on whether to escape the agreement, and is premised upon a petition filed on April 6,
24 2007, well after the union-security provision took effect.
25

1 In such circumstances, the Board found that it did not make sense to require the Petitioner
 2 to wait for a union-security clause to be in effect prior to gathering the required showing of
 3 employee interest. The Union had been recognized as the collective-bargaining representative,
 4 and the Petitioner “reasonably believed that a union-security provision was imminent. [W]aiting
 5 for the parties to execute the contract [to collect the signatures] serves to needlessly - and, from
 6 the perspective of many employees, arbitrarily – delay the employees’ right to be relieved of a
 7 union-security provision should the majority so will.” Id. at 4-5. The Board further found that
 8 the employee signatures here, while pre-dating the contract, nonetheless demonstrated the
 9 employees’ substantial desire to vote on the question of union security.
 10

11 The difference of opinion between the Board majority and dissenting Member Walsh
 12 demonstrates that Section 9(e)(1) is hardly a clear and mandatory provision as to this point, and
 13 that reasonable minds differ as to its proper interpretation.⁵ In short, the Board’s decision falls
 14 well within the broad confines of its Section 9 authority. See NLRB v. Best Products Co., Inc.,
 15 765 F.2d 903, 908 (9th Cir. 1985) (“[t]he Board has wide discretion to determine representation
 16 matters and questions arising during election proceedings”); NLRB v. Berryfast, Inc., 741 F.2d
 17 1161, 1163 (9th Cir. 1984); see also NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946).
 18

19 Significantly, the Seventh Circuit previously rejected a union’s similar argument that the
 20 Board’s conduct of a deauthorization election violated Section 9(e) and therefore should be
 21

22 ⁵ Member Walsh argued that the “plain meaning” of Section 9(e)(1) requires that “the showing
 23 of interest for a deauthorization petition must be gathered at a time when the employees are
 24 actually subject to a union-security provision.” (Exh. 2 to Complaint at 6). However, the Board
 25 majority noted that Member Walsh’s “plain meaning” conclusion focused only on a part of the
 language of Section 9(e)(1), while the majority examined the section as a whole, including the
 introductory clause referring to the filing of a petition with the Board. “Bringing that clause into
 the analysis,” the majority found “that the statutory language is unclear as to whether the
 showing of interest in support of that petition may be gathered in advance of an agreement
 containing a union-security clause.” Id. at 2.

enjoined. Teamsters v. Madden, 343 F.2d at 500, thus supports the conclusion that Section 9(e)(1) is not clear and mandatory as to the collection of employee signatures. There, like here, a union asserted that the Board's interpretation of Section 9(e)(1) was incorrect. Madden rejected this assertion and found that the district court had no subject matter jurisdiction because the Board's interpretation of Section 9(e)(1) was not contrary to a clear and mandatory provision. 343 F.2d at 500. The Court here, like in Madden, should reject the Union's request to enjoin the Board's permissible exercise of discretion.

In short, this disagreement over the proper interpretation of Section 9(e)(1) provides no basis for subject matter jurisdiction in this case. See Nat'l Maritime Union, 375 F. Supp. at 434. As explained by the Ninth Circuit in Teamsters, Local 690, 375 F.2d at 971 (quoting International Ass'n of Tool Craftsmen v. Leedom, 276 F.2d 514, 516 (D.C. Cir. 1960)):

We need not decide whether we would sustain the Board's view if the question were presented to us in an appeal under the judicial review provisions of [Section] 10 of the Act. . . . We need only decide, as we do, that the statutory language itself and the legislative history sufficiently support its position to eliminate the essential requirement for invoking the District Court's equity jurisdiction, namely, a showing that the Board violated a 'clear and mandatory' statutory prohibition (citations omitted)

Accordingly, as set forth above, any disagreement by the Union or this Court with the Board's interpretation of Section 9(e)(1) does not permit the judicial review sought here.

III. THE UNION CANNOT SHOW IRREPARABLE INJURY OR THAT ITS ALLEGED INJURY OUTWEIGHS THE HARM TO THE BOARD AND PUBLIC INTEREST IN PERMITTING EMPLOYEES TO RESCIND A UNION-SECURITY AGREEMENT

There is no merit to the Union's assertions of irreparable harm. As a practical matter, if the election goes forward and a majority of the eligible unit voters do not vote to rescind union-security authority, all the employees will remain subject to that contractual requirement and the only cost to the Union will have been that of participating in the administrative proceeding.

1 29 U.S.C. § 158(a)(3) (1998). Such cost is not an injury that will support the grant of an
2 injunction. See, e.g., FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980); Renegotiation Board
3 v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 24 (1974) (“Mere litigation expense, even
4 substantial and unrecoupable cost, does not constitute irreparable injury.”); Bakersfield City
5 School Dist. v. Boyer, 610 F.2d 621, 626 (9th Cir. 1979); State of California v. Federal Trade
6 Commission, 549 F.2d 1321, 1323 (9th Cir. 1977). If, on the other hand, a majority votes to
7 rescind the union-security authority, that result would underscore the reasonableness of the
8 Board’s holding here that the 30 percent showing of interest was a sufficient gauge of employee
9 sentiment to prompt an election on this question.

10
11 One of the Union’s alleged harms rests on the assumption that, if the deauthorization
12 election goes forward, employees will discuss these union-security issues at their work places at
13 the airport in violation of work rules (Docket No. 28 at 7). The election, of course, will not
14 require employees to violate their employer’s rules. Indeed, the Union would have the Petitioner
15 start all over again soliciting employee support and then file a new petition for an election, thus
16 causing the same alleged injurious union-security debate the Union currently fears. Thus, the
17 grant of the Union’s requested injunction would then just delay the same expression of employee
18 sentiment and frustrate the Board’s exercise of discretion.

19
20 It is notable that the alleged harms complained of by Plaintiff SEIU Local 790 will be
21 suffered exclusively by a separate organization, SEIU Local 1877 (see Docket No. 28 at 6),
22 which is not a party to this action. The Plaintiff here has utterly failed to show why an injury to a
23 separate local union, which is not the collective bargaining representative recognized by the
24 Employer, should justify its own ability to obtain an injunction against the Board’s proceeding.

1 The Union also has failed to show that its interest in not participating in the
 2 deauthorization election outweighs the harm to the employees who have expressed a desire to be
 3 permitted to vote on rescinding union-security authority. As explained above, Congress intended
 4 for unions to have presumptive authority to enter into union-security arrangements, but only
 5 while preserving an escape valve for an unwilling majority covered by such an agreement. An
 6 injunction here would clearly frustrate the Board's ability to fulfill Congressional intent and the
 7 employees' ability to vote on a petition filed by employees covered by an agreement containing a
 8 union-security provision. Thus, the Union's desire to prevent the anticipated election should
 9 yield to the substantial public interest expressed by Congress permitting employees to determine
 10 whether to rescind a union-security agreement.
 11

12 Accordingly, in evaluating the "balance of hardships," the greatest hardship would be
 13 against the Board and the public interest in maintaining employees' statutory right to rescind a
 14 union-security provision.
 15

16 CONCLUSION

17 For the foregoing reasons, the Board respectfully requests that the Union's request for
 18 injunctive relief be denied.
 19

20 Respectfully submitted,

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